United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Signed

74-2083

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

MEDWIN BENJAMIN,

Appellant

v.

COMMISSIONER OF INTERNAL REVENUE,

Appellee

ON APPEAL FROM THE DECISION OF THE UNITED STATES TAX COURT

BRIEF FOR THE APPELLEE

SCOTT P. CRAMPTON,
Assistant Attorney General,

GILBERT E. ANDREWS,
LEONARD J. HENZKE, JR.,
LIBERO MARINELLI, JR.,
Attorneys,
Tax Division,
Department of Justice,
Washington, D.C. 20530.

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Whether the Tax Court abused its discretion in refusing to vacate its orders dismissing the actions to which this appeal pertains for want of prosecution.

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diction is conferred on this Court by Section 7482 of the Internal Revenue Code.

The facts pertinent to this appeal may be stated as follows:

The taxpayer claimed deductions for an alleged $2,000,000 net operating loss on his 1965 income tax return and for carryovers of the loss on his returns for 1966 through 1970. This loss allegedly occurred when his business assets were seized in 1951 pursuant to execution on a judgment in favor of the Government. The taxpayer, however, claims that the loss was realized for income tax purposes in 1965 because it was not until then that this effort to recover the loss in a Court of Claims suit was unsuccessfully concluded. (R. 11a-13a, 39a.)[1/]

On September 22nd and 26th, 1969, the Commissioner informed the taxpayer by statutory notices of deficiency that his claims for these deductions had been disallowed for 1965 through 1968. The reason for disallowance was that the taxpayer failed to establish the year and the amount of the loss. The taxpayer

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1/ "R." references are to the separately bound record appendix. Other record references are to the original record on appeal. This has been necessitated by the taxpayer's omission from the record appendix of most of the items which the Government counter-designated for inclusion. The omission was discovered too late to allow printing a supplemental record appendix and filing a brief with citations to the supplemental appendix before the due date for the brief. Since this case is already more than four years old and since the appellate proceedings have been delayed by the taxpayer's filing his brief some ten weeks out of time, the Government felt that further delay to prepare a supplemental record appendix was not the best course.

contested the disallowance--filing with the Tax Court on December 17, 1969, the petition for the first of the two cases now on appeal. (R. 15a, 20a, 22a, 24a, 31a.)

Mr. Stanley Arthur Beiley, a Miami attorney, prepared the petition for the taxpayer. Apparently for his convenience, the taxpayer requested Miami as the trial site--which request was granted.[2/] On February 25, 1971, more than a year after the petition was filed, Mr. Beiley moved to withdraw from the case for the reason that the taxpayer wished to employ other counsel.[3/] The Tax Court granted his motion on March 1, 1971. (R. 3a, 14a.)

By notice of March 8, 1971, trial was initially set for June 7, 1971. At about the time of the notice, the Commissioner's counsel drafted a proposed stipulation of facts (the Miami stipulation) for use at the trial and forwarded it to the taxpayer for signature. It was signed by the taxpayer and then returned by letter dated May 21, 1971. The Commissioner's counsel signed it in turn. This proposed stipulation, however, was never filed with the Tax Court. Of significance, the Miami

2/ The taxpayer's brief suggests that the reason for selecting Miami as the trial site was that he resided there when he filed his petition. (Br. 2.) His petition, however, alleges that he was then a resident of New York City.

3/ The implication in taxpayer's brief that prior to Mr. Greenberg's entry into the case he was not represented by counsel is therefore not completely accurate. (Br. 3, 4, 6, 12, 13, 17, 18.)

stipulation limited the issues to be decided b y the Tax Court to the year of the loss. By implication, it excluded from the Tax Court's consideration the questions of whether the loss was deductible at all and, if so, what the amount of the loss was for tax purposes.[4/] (R. 3a, 150a.)

When the case was called for trial in Miami on June 7, 1971, the taxpayer appeared without counsel. He informed Judge Craig S. Atkins that because of his lack of counsel he was not ready to proceed. He also suggested that trial would be more convenient for him in New York because counsel could be obtained there more readily and his facilities were located there. In this regard, he said that he had spoken with a number of New York attorneys and that one, Mr. Buchsbaum, had said he would try to serve as counsel. Judge Atkins said he would grant a continuance to allow change of the trial site and retention of counsel. But, he also said he would recommend setting the case on an early calendar and denial of any additional continuances. (Doc. 13, 3-5, 7-9.)

The taxpayer inquired whether the proposed stipulation would have effect at the trial in New York. Judge Atkins responded that he would not accept the proposed stipulation because the taxpayer had signed it without the benefit of counsel's advice. He noted that taxpayer had expressed a desire in chambers to have counsel examine the proposed stipulation before its acceptance

4/ Failure to establish the amount of the loss was one of the reasons specified in the deficiency notices for disallowing the deduction.

and he was willing to accede to the request. (Doc. 13, pp. 4-6.)

On June 7, 1971, Judge Atkins ordered the case continued generally. At that time, taxpayer acknowledged at least three times his need for counsel. At the same time, taxpayer expressed his wish to have an attorney review the Miami stipulation. Judge Atkins indicated that he would recommend that no further continuances be granted. (Tr. June 7, 1971, pp. 1-9.) On June 30, 1971, the taxpayer's request for change of the trial site to New York was granted. On October 27, 1971, trial was set for New York on January 24, 1974. (R. 3a-4a.)

When Judge William H. Quealy called the case for trial in New York on January 24, 1972, the taxpayer again was without counsel. As the proceedings progressed, Judge Quealy realized there was some misunderstanding over the stipulation of facts. This prompted him to continue the case once again. But, in so doing, he noted the case had previously been continued and was being continued again only because the taxpayer was not available for trial during the succeeding 30 days. Concluding the hearing, he admonished: "But, I think the next time the case is set for trial, Mr. Benjamin will have to be prepared

either with your witnesses or with the stipulation.[6/] (Doc. No. 18, pp. 3-4.)

The next time the case was called for trial was in New York, on November 13, 1972, by Judge Arnold Raum. Again appearing without counsel, the taxpayer indicated he was ready to proceed if the case were tried with the Miami stipulation. The Commissioner's counsel, however, refused to be bound by the stipulation--explaining that it was incomplete and inaccurate. He pointed out that the stipulation limited the issues for the Court's decision to the year of the loss, and noted the Government's position at this time was that the taxpayer was required to establish the amount of the deductible loss as well as the year. The Commissioner's counsel informed Judge Raum that he had prepared a new proposed stipulation. The taxpayer, however, insisted on being allowed to use the Miami stipulation--giving as his reason that with the Miami stipulation he could try the case himself, but with the new stipulation he would require a lawyer, whom he could not afford. Judge Raum requested that the taxpayer examine the new proposed stipulation to determine whether the matters stated in it were true and whether he

6/ The taxpayer's brief refers to this as the first hearing and the one on November 13, 1972, as the second. (Br. 3.) It also states the case was transferred to New York in March of 1971, although the change of the trial site was ordered on June 30, 1971, after the hearing in Miami. Taxpayer has apparently overlooked the hearing on June 7, 1971.

could agree to its use. At this point, he concluded the hearing. (R. 49a-55a, 59a.)

Judge Raum next called the case for trial on November 20, 1972. Once more without counsel, the taxpayer again insisted on being allowed to use the Miami stipulation, and the Commissioner's counsel again refused to be bound by it. The taxpayer requested that Judge Raum order the Commissioner's counsel to file the Miami stipulation--which request was denied. In turn, the taxpayer said that without the Miami stipulation he was not ready to proceed, and, for this reason, he wished a continuance. Judge Raum granted the continuance, advising, however, the parties should be ready to proceed the next time the case was set for trial. (R. 70a-71a, 73a, 75a-76a, 78a, 81a-83a.)

On April 24, 1973, a deficiency notice was sent to the taxpayer informing him of the disallowance of the net operating loss carryover deductions for 1969 and 1970, by reason of the disallowance of the loss involved in the then pending 1969 case. On July 2, 1973, the taxpayer filed with the Tax Court the petition for redetermination of the deficiency, beginning the second of the two cases now on appeal. In the meantime, on June 25, 1973, trial was next set on the pending 1969 case for October 1, 1973. At the hearing held that date, the taxpayer successfully moved to have the two cases consolidated. (R. 4a, 38a, 42a, 44a, 88a-90a, 107a.)

When Judge Bruce M. Forrester called the case for trial on October 1, 1973, the taxpayer was again without counsel and again insisted on trying the cases on the basis of the Miami stipulation. At this point, Judge Forrester ruled that the Miami stipulation was not binding, since it was never filed and did not express a current consensus of the parties. He then inquired when the parties would be ready to proceed in the absence of a stipulation. The Government was ready to proceed immediately. The taxpayer responded that if the Miami stipulation were not accepted he could not be ready for another three months. Because of the prior delays, Judge Forrester set the case for trial on October 4, 1973. (R. 90a-91a, 93a, 95a-98a, 103a-106a.)

When the case was called on October 4, 1973, no appearance was made on behalf of the taxpayer. The Government moved for dismissal and decision for failure to prosecute. Judge Forrester granted the motion by orders dated October 17, 1973, finding deficiencies in the amounts set forth in the deficiency notices. On December 27, 1973, the taxpayer filed motions to vacate the orders of dismissal. Hearing on the motions was eventually set for New York on May 13, 1974. On that day, Mr. Harold Greenberg filed an entry of appearance as counsel for the taxpayer. (R. 4a-5a, 7a-8a, 126a-129a, 133a-134a, 137a-138a, 144a.)

At the May 13th hearing, Mr. Greenberg said that prior to October 4, 1973, the taxpayer had informed the Court, both orally and by letter, of his unavailability on that day. Judge Forrester noted that there was nothing in the transcript of the proceedings on October 1st to show the taxpayer had orally informed the court of his unavailability. He also observed that the letter referred to was received by the court on October 5th. Mr. Greenberg noted that the taxpayer's problem in the case was the lack of counsel, and added that the problem had been corrected, that the taxpayer still wanted his day in court, and that, if allowed, he would try the case for the taxpayer in the next session of the Court in New York. Judge Forrester responded that he thought that the court had been misused by the taxpayer and that under the circumstances he did not find cause to vacate the orders of dismissal. The same day, Judge Forrester entered orders denying the taxpayer's motion to vacate the orders of dismissal. (R. 10a, 177a, 181a-184a, 189a, 191a.)

From the orders denying the motion to vacate, the taxpayer appeals.

SUMMARY OF ARGUMENT

The Tax Court did not abuse its discretion in dismissing taxpayer's action for failure to prosecute. The dismissal was fully justified by the taxpayer's failure to appear for trial on October 4, 1973, and by the long delays in the proceedings occasioned by his resistence to procedural rulings.

The fact that the taxpayer had sent a letter to the court three days before trial requesting a continuance on the basis of out-of-town business cannot excuse his failure to appear. The taxpayer incorrectly addressed the letter; he made no effort to telephone or telegraph the court or otherwise ensure that it would in fact receive prior notification of his nonappearance; and, in fact, the letter was not received until the day after the scheduled trial. The letter itself did not assure the court that the taxpayer would be ready for trial within the additional time requested, and was another of a long series of previously granted requests for continuance that had already delayed the trial three times over a period of two and one-half years. On prior occasions, several Tax Court judges had admonished the taxpayer that no further continuances would be granted, so that the dismissal here was fully forwarned.

The taxpayer may not excuse his failure to appear by arguing that the Tax Court in prior hearings had improperly failed to hold the Government to an unfiled stipulation, thereby allegedly increasing taxpayer's trial burdens. To begin with, it is of course fundamental that a party dissatisfied with a procedural

ruling must proceed with the trial and then challenge the ruling on appeal, rather than seeking continual delays and failing to appear for a scheduled trial. In any event, the Tax Court's decision, two years earlier, not to hold the Government to an unfiled stipulation was correct. The executed stipulation originally was not filed at taxpayer's request so as to enable him to have new counsel to examine it. While the taxpayer was attempting to secure such review, a review by Commissioner's counsel revealed a concession which would substantially prejudice the Government's case and prompted him to secure court approval that he not be bound by it. Since an unfiled stipulation is not binding under the Tax Court's procedures and since the review period had been sought by the taxpayer himself, the Tax Court did not abuse its discretion in refusing taxpayer's later request that the stipulation as originally executed bind the Commissioner. Indeed, the trial judge could properly have relieved the Goverment of the stipulation even if it had been filed.

Finally, the taxpayer's pro se status should not be permitted to serve as a basis for reversing the Tax Court judge. The taxpayer had counsel at the beginning of the Tax Court proceedings, but consciously elected to handle certain proceedings pro se, apparently in the belief that this course was beneficial to him. The frequent reversals of course respecting employment of counsel enabled him to obtain additional time to prepare his case far and beyond that ordinarily permitted. Having elected to handle some proceedings with counsel and some without, the

taxpayer should not be allowed extraordinary allowances by this Court after his strategy has gone awry.

ARGUMENT

THE TAX COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO VACATE ITS ORDERS DISMISSING THESE ACTIONS FOR WANT OF PROSECUTION

A motion to dismiss for want of prosecution is addressed to the sound discretion of the trial court, as the taxpayer himself concedes (Br. 18). E.g., Schwarz v. United States, 384 F. 2d 833 (C.A. 2, 1967). A decision to dismiss for want of prosecution, therefore, may be reversed on appeal only for an abuse of discretion. E.g., Theodoropoulos v. Thompson-Starrett Co., 418 F. 2d 350 (C.A. 2, 1969). One rule of thumb for determining whether an abuse has occurred is whether the reviewing court is left with a firm conviction that the trial court committed clear error. States Steamship Co. v. Phillippine Air Lines, 426 F. 2d 803, 804 (C.A. 9, 1970). Another is whether upon a comparison of the trial court's action with the events and circumstances of the case the reviewing court is forced to conclude the trial court's action exceeds the bounds of reason or is contrary to the principles of law and equity. Janousek v. French, 287 F. 2d 616, 621 (C.A. 8, 1961).

The determination of whether the trial court has committed an abuse of discretion is made on the basis of the facts and circumstances of the particular case. E.g., States Steamship Co. v. Phillippine Air Lines, supra, p. 804. Each case is said to turn on its own facts. There are some benchmarks, however.

One is the age of the case, i.e., whether it is a few months (e.g., Davis v. Operation Amigo, Inc., 378 F. 2d 101 (C.A. 10, 1967)) or many years old (e.g., Lessmann v. Commissioner, 327 F. 2d 990 (C.A. 8, 1964)). A factor often found where dismissal is justified is that the party suffering dismissal has been granted a number of continuances and is still unready to proceed at the time of dismissal. E.g., Katz v. Commissioner, 188 F. 2d 957 (C.A. 2, 1951). Another is that the dismissed party's conduct has evidenced an intention to prolong the trial proceedings as long as possible. E.g., Montgomery v. Commissioner, 367 F. 2d 917, 920 (C.A. 9, 1966). And, of course, the most telling justification is that the dismissed party has failed to appear at a scheduled hearing without adequate excuse. E.g., Link v. Wabash Railroad Co., 320 U.S. 626 (1960). In the instant case, analysis of the facts and circumstances fully justifies the Tax Court's dismissal of the actions for failure to prosecute; certainly such dismissal was not an abuse of discretion under these commonly accepted guidelines.

The crucial fact here is that the taxpayer did not appear for the trial set before Judge Forrester on October 4, 1973. Under the Tax Court's rules, this, by itself, was cause for dismissal. Rules of Practice of the United States Tax Court (Rev. 1958, 1971 ed.), Rule 27(c)(3). Aggrevating the infraction of not appearing, the taxpayer also failed effectively to notify the court of his intention not to be present. In the taxpayer's brief (p. 18), he points out that he wrote the court explaining he would not be present and requesting the proceedings be delayed

to the week succeeding that of the trial date. But, the letter was not received by the court until the day after the scheduled hearing (R. 183a); it was not properly addressed (R. 139a); and, it was not the most expeditious means of notification.

In his brief, the taxpayer suggests that the letter should nonetheless provide a sufficient basis for relieving him of the dismissal. According to the taxpayer, the letter evidences a willingness to proceed to trial and a reasonable excuse for not being present at the October 4th hearing, i.e., a prior commitment in Wilmington, Delaware, that day. Yet, the letter in no way indicated why it was more important for him to be in Wilmington than in the courtroom on October 4th. The taxpayer then says that it was reasonable for him to assume that the one week continuance requested in the letter would be granted so that he would not be held in default for not appearing.[7/] But, the letter failed to state an adequate basis for granting a continuance since it gave no assurance that the taxpayer would be ready to proceed on a date to which the case might be continued. Prior continuances under similar circumstances had resulted in the proceedings being delayed on one occasion

7/ In his letter dated October 1, 1973, the taxpayer did not actually request a one week delay in the trial. Instead, he asked that the case be heard during the succeeding week. The letter gave every indication that, if the court had ordered a hearing in the succeeding week, the taxpayer again would have raised the matter of the stipulation which will be discussed. infra, and again would have set forth his unreadiness for trial. There was no assurance or promise in the letter that the taxpayer would have been ready to go to trial in the succeeding week.

for 10 months and on another 11 months.[8/] In a word, without an adequate basis for granting a continuance, it was unreasonable to assume one would be granted--particularly in light of the delays resulting from earlier continuances.

The Tax Court's dismissal of the cases in October, 1973, was further justified by the history of the taxpayer's prior delays. The 1969 case was almost four years old when dismissal was ordered. See Schwarz v. United States, supra. It had been continued three times because the taxpayer was not ready to proceed when the case was called for trial. See Bree v. Commissioner, 368 F. 2d 116 (C.A. 8, 1966). The first continuance was granted to afford the taxpayer a chance to obtain counsel. He had discharged counsel more than three months prior to the first hearing, representing to the court at the time it approved counsel's withdrawal that he wished to employ other counsel. See Lessmann v. Commissioner, supra. He then proceeded through four subsequent hearings over a period of almost three years before hiring another attorney. These delays were in spite of admonitions from several Tax Court judges that no further continuances would be allowed. (Doc. 13, pp. 7-9; Doc. 18, pp. 3-4; R. 70a-83a.)

8/ In January of 1972, Judge Quealy continued the proceedings generally, delaying them for ten months, because the taxpayer was not ready for trial when the case was called and would not be available for trial during the succeeding 30 days and because the court's New York trial session then had less than 30 days to run. A continuance pursuant to the request in the letter could quite possibly have necessitated another long continuance since the court's New York trial session in October of 1973 may not have been scheduled to go into the succeeding week.

The main justification which the taxpayer gives for his failure to appear and for his repeated delays is the Tax Court's refusal to require filing of the original stipulation executed by the parties in the case. Initially, it seems important to note the basic principle that taxpayer's delays and failure to appear cannot be justified on the basis of whether the Tax Court's rulings on the stipulation were correct or erroneous. If the stipulation rulings were incorrect, the proper procedure, of course, was for taxpayer to present his case and then challenge the stipulation ruling on appeal.

In any event, in the circumstances here, the Tax Court did not abuse its discretion in not holding either party to the unfiled stipulation; indeed, as we shall see, the Tax Court's ruling was in part an accommodation of taxpayer's own needs and wishes. The stipulation was signed by both parties prior to the hearing in Miami on June 7, 1971. It was drafted with the idea that it would be used in a trial there at that time. The trial did not occur because the taxpayer was without counsel and for that reason was not ready to proceed. To safeguard his rights and at his insistence, the Tax Court refused to accept the stipulation, granting his request that its filing be delayed until the counsel he would retain had a chance to examine it. During that interim, and before the case was next called for trial, the Commissioner's counsel informed the taxpayer that the Miami stipulation was unacceptable to him. (R. 92a, 185a.) Thereafter, each successive time the case was

called, the taxpayer insisted that trial be had on the basis of the Miami stipulation--well knowing that Commissioner's counsel would refuse. And, on each successive occasion, the taxpayer informed the court that, without the stipulation, it would be weeks or months before he could be ready for trial.

When the case was called for trial in November of 1972, Judge Raum ruled that the Government was not bound by the stipulation and that the taxpayer would have to use other evidence to prove his case. Because the taxpayer was not ready with other evidence, the case was continued for eleven months. At the time the case was next called in October of 1973, the taxpayer again insisted on trying the case with the Miami stipulation. When Judge Forrester again ruled that the Government was not bound by the stipulation, the taxpayer said that he would require an additional three months to prepare for trial. Trial was set for four days later, and the taxpayer failed to appear.

The taxpayer's arguments in this Court concerning the Miami stipulation cover over the crucial point on which the Tax Court based its refusal to hold the Government to its provisions. That is, the stipulation never became binding because at no time was it presented to the court when the parties were in mutual agreement that it should be used. (R. 76a, 95a-96a, 98a, 104a.) See generally, 9 Mertens, Law of Federal Income Taxation (Rev.), § 50.72, pp. 200-206. The court's rulings were consistent with the Tax Court rules then

in effect,[9/] providing for the filing of the written stipulations (Rules of Practice of the United States Tax Court (Rev. 1958, 1971 ed.), Rule 31(b)(3)) and with the court's precedents requiring the filing of a stipulation to make it effective (Cole v. Commissioner, 30 T.C. 665 (1958), aff'd per curiam, 272 F. 2d 13 (C.A. 2, 1959)). See also 9 Mertens, supra, p. 206.

On appeal, the taxpayer mentions the basis for the Tax Court's refusal to hold the Government to the stipulation (Br. 4, 5, 8), but then promptly forgets it--never directly disputing that an unfiled stipulation is not binding. In any event, in the circumstances here, the Tax Court would have been justified in relieving the Commissioner of the stipulation even if it had been filed.[10/] When the first hearing in the case was held in Miami, the taxpayer was unwilling to be bound by it--at least at that time; thereafter, the Government refused to be

9/ Rule 91(a) of the Tax Court Rules of Practice which were effective January 1, 1974 (after the stipulation ruling involved here), which taxpayer cites (Br. 9), would not require any different conclusion.

10/ Even assuming the Government had unilaterally sought to withdraw from the stipulation, the Tax Court still would not have erred in refusing to hold the Government to its provisions. The Government objected to the stipulation because it precluded consideration of whether the loss was deductible and, if so, what was the amount of the deductible loss. These are the most basic issues in a tax dispute over a loss deduction. They are so basic that, as the Tax Court observed (R. 74a), the court could have considered them even though not raised by the parties. De Groff v. Commissioner, 54 T.C. 59 (1970). In such circumstances, justice might property have permitted the Government's withdrawal from the stipulation. See Central Distributors, Inc. v. M.E.T., Inc., 403 F. 2d 945 (C.A. 5, 1968); Logan Lumber Co. v. Commissioner, 365 F. 2d 846 (C.A. 5, 1966).

bound. The Government certainly was entitled to repudiate the stipulation as long as the Tax Court left that option open to the taxpayer at his request. See generally, 73 Amer. Juris. 2d, Stipulations, § 2.

The taxpayer's allegations (Br. 10-11) as to the prejudicial effect of the withdrawal of the stipulation are also without merit. Prejudice in the context of withdrawing stipulations means that the party objecting to withdrawal cannot be returned to the status quo if the other party withdraws from the stipulation. See Central Distributors, Inc. v. M.E.T., Inc., 403 F. 2d 945 (C.A. 5, 1968); 73 Amer. Juris. 2d, Stipulations, § 13. That this case may have become more complex without the stipulation, so as to cause the taxpayer to reconsider his decision not to employ counsel, does not prejudice him. The taxpayer had already decided to employ counsel at about the time he signed the stipulation.

Contrary to the taxpayer's suggestion (Br. 22), there are not present here the appropriate circumstances for relieving the taxpayer of the dismissal on the basis of his lack of counsel during certain of the proceedings below. The taxpayer had counsel at the beginning of the Tax Court proceedings, but consciously elected to handle certain proceedings pro se, apparently in the belief that this course was beneficial to him. The frequent reversals of course respecting employment of counsel enabled the taxpayer to obtain additional time to prepare his case far and beyond that ordinarily permitted. Cf. Katz v. Commissioner, supra, p. 959. The Tax Court was extraordinarily

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believe that he would be any more
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CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Tax Court.

Respectfully submitted,

SCOTT P. CRAMPTON,
Assistant Attorney General,

GILBERT E. ANDREWS,
LEONARD J. HENZKE, JR.,
LIBERO MARINELLI, JR.,
Attorneys,
Tax Division,
Department of Justice,
Washington, D.C. 20530.

JANUARY, 1975.

CERTIFICATE OF SERVICE

It is hereby certified that service of this brief has been made on opposing counsel by mailing four copies thereof on this 15th day of January, 1975, in an envelope, with postage prepaid, properly addressed to him as follows:

Harold Greenberg, Esquire
Glass, Greenberg & Irwin
540 Madison Avenue
New York, New York 10032

Gilbert E. Andrews/euh
GILBERT E. ANDREWS
Attorney